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IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL AND FOREIGN LEGAL SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI

This Brief of *Amici Curiae* is respectfully submitted jointly by two groups: (1) United States scholars; and (2) foreign scholars.[1] Each of the scholars has studied or written extensively on subjects pertaining to international law, human rights law, or foreign affairs law.[2]

Amici believe that efforts to restrict the nature and scope of the Alien Tort Claims Act ("ATCA") conflict with the text of the statute, the historical record, and well-established case law. Since the seminal ruling of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), federal courts have applied the ATCA to impose civil liability for only the most serious violations of international law. For the past twenty-four years, federal courts have adopted a balanced interpretation and application of the ATCA. *Amici* support this nuanced approach to ATCA litigation.[3]

SUMMARY OF ARGUMENT

The Alien Tort Claims Act explicitly authorizes civil actions brought by aliens for torts committed in violation of the law of nations or a treaty of the United States. 28 U.S.C. § 1350. Courts construing the plain wording of the statute in

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[1] No counsel for either party authored the brief in whole or in part. No person or entity, other than *amici curiae*, its members, and counsel, made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this brief. Their consents have been filed with the Court.

[2] *Amici* consist of over 75 scholars from throughout the world, including Australia, Canada, Ireland, Mexico, the Netherlands, New Zealand, the United Kingdom, and the United States. A complete list of *amici* is located in the Appendix.

[3] *Amici* take no position on the other issues raised in this litigation.

its historical and doctrinal context have concluded that it provides subject matter jurisdiction and a cause of action for serious violations of international law, including human rights abuses.

The Petitioner and the Justice Department have sought to undermine this well-established understanding of the ATCA. First, they argue that the Alien Tort Claims Act is purely a jurisdictional statute. Second, they assert that U.S. courts may not consider unratified treaties or non-binding U.N. resolutions in construing the status of customary international law. Third, they allege that the ATCA cannot be applied extraterritorially. Finally, they suggest that ATCA litigation raises separation of powers concerns.

Taken together, these submissions offer no coherent vision of the ATCA. Indeed, the Justice Department's most recent analysis flatly contradicts the positions it expressed in *Filartiga v. Pena-Irala*, 630 F.2d at 876, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and *National Coalition Gov't of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997).[4] In

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[4] The Justice Department Brief is at least the eighth filing since 1980 in which the Government has offered its interpretation of the ATCA. The United States has also filed briefs addressing the scope of the ATCA in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (supporting jurisdiction); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (opposing certiorari); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987) (arguing that the ATCA does not provide jurisdiction over foreign sovereign); *Trajano. v. Marcos*, 978 F.2d 493 (9th Cir. 1992) (offering restrictive interpretation of the ATCA); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (supporting jurisdiction); *Alvarez-Machain v. Sosa*, 331 F.3d 604 (9th Cir. 2003) (*en banc*) (opposing jurisdiction); *Doe v. Exxon Mobil Corp.*, 1-01-CV-1357 (D.C. Cir. 2003) (opposing jurisdiction).

stark contrast, the judiciary has developed a coherent and consistent body of ATCA jurisprudence for twenty-four years.

The arguments set forth by the Petitioner and the Justice Department are unpersuasive; they contradict the express terms of the statute and do not comport with the historical record. They invite the courts to amend the statute without considering the views of Congress, which not only adopted the ATCA in 1789 but which extended it in the Torture Victim Protection Act of 1991. Additionally, they threaten to usurp the constitutional role of the courts to decide cases and controversies properly presented to them.

For these reasons, the Court should reject the arguments of the Petitioner and the Justice Department and affirm the long-recognized (and balanced) interpretation of the Alien Tort Claims Act.

ARGUMENT

I. THE ALIEN TORT CLAIMS ACT PROVIDES SUBJECT MATTER JURISDICTION AND A CAUSE OF ACTION FOR SERIOUS VIOLATIONS OF INTERNATIONAL LAW.

Enacted as part of the First Judiciary Act of 1789, the Alien Tort Act provides: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Since *Filartiga v. Pena-Irala*, the ATCA has been interpreted to establish subject matter jurisdiction and a cause of action for serious violations of international law, including violations of human rights norms.

A. This Approach is Consistent with the Language and History of the Alien Tort Claims Act.

By its terms, the ATCA covers lawsuits: (1) by an alien; (2) for a tort; (3) committed in violation of the law of nations or a treaty of the United States.[5] *See Estate of Rodriquez v. Drummond Company*, 256 F. Supp. 2d 1250, 1259-1260 (N.D. Ala. 2003); *Ge v. Peng*, 201 F. Supp. 2d 14, 19-20 (D.D.C. 2000); *Jama v. INS*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 at 238. The statute contains no additional reference to Congressional incorporation or to a case "arising under" federal law. *Cf.* 28 U.S.C. § 1331.

This was clearly understood by eighteenth-century courts, as suggested in the first reported case involving the ATCA.[6] In *Bolchos v. Darrel*, 3 Fed. Cas. 810 (D. S. Car. 1795), a French plaintiff sought restitution for the seizure and sale of slaves who had been taken from a captured Spanish prize vessel. Jurisdiction was premised on the ATCA. The court found that it had jurisdiction, dismissing "all doubt upon this point." *Id.* At no time did the court indicate that independent congressional authorization was necessary to allow the lawsuit to proceed.

This approach to the ATCA is also found in the opinions of the Attorney General. In 1795, Attorney General William Bradford addressed a situation in which American citizens trading off Sierra Leone were alleged to have joined

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[5] The term "law of nations" is now synonymous with international law. *See* Jordan Paust, *International Law as Law of the United States*, 63, 229-236, 311-312 (2d ed. 2003); M.W. Janis, "Jeremy Bentham and the Fashioning of 'International Law,'" 78 *Am. J. Int'l L.* 405 (1984).

[6] *See generally* Paust, *supra*, at 7-9, 233-234, 286-288, 391-392.

a French fleet in attacking and plundering British property on that coast. The opinion, only six years removed from the adoption of the First Judiciary Act, provides some insight into the contemporary understandings of the ATCA. After discussing the availability of criminal prosecution, the Attorney General addressed the ATCA.

> [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States; . . .

Breach of Neutrality, 1 *Op. Att'y Gen.* 57, 59 (1795) (emphasis in original). *See also Mexico Boundary – Diversion of the Rio Grande*, 26 *Op. Att'y Gen.* 250, 253 (1907) ("I repeat that the statutes thus provide a forum and a right of action."); *Abduction and Restitution of Slaves*, 1 *Op. Att'y Gen.* 29, 30 (1792) (apparent reference to a possible civil action under the ATCA where the defendant had committed piracy by stealing slaves from a French colony).

The reason for this uniformity of understanding regarding the ATCA is evident: the law of nations was considered a part of the common law. *See* Louis Henkin, "International Law as Law in the United States," 82 *Mich. L. Rev.* 1555 (1984); Edwin D. Dickinson, "The Law of Nations as Part of the National Law of the United States," 101 *U. Pa. L. Rev.* 26 (1952). Thus, "the First Congress understood that torts in violation of the law of nations would be cognizable at

common law, just as any other tort would be."[7] William S. Dodge, "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists'," 19 *Hastings Int'l & Comp. L. Rev.* 221, 239 (1996). In cases alleging violations of the law of nations, the courts of the fledgling nation should be open to aliens seeking a remedy.[8]

Thus, the arguments raised by the Petitioner and the Justice Department, that the ATCA requires explicit statutory authorization and an express right of action to implement its provisions, are contrary to the historical record. Indeed, these additional requirements would necessarily defeat the application of the law of nations in domestic courts by erecting a test that no case can pass, thus rendering the ATCA

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[7] *See also* Paust, *supra*, at 14-15, 229-236, 311-312; Anthony D'Amato, "Judge Bork's Concept of the Law of Nations is Seriously Mistaken," 79 *Am. J. Int'l L.* 92 (1985).

[8] In 1790, Chief Justice John Jay made this point in a grand jury charge:

> We had become a Nation – as such we were responsible to others for the observance of the Laws of Nations; and as our national Concerns were to be regulated by national Laws [,] national Tribunals became necessary for the Interpretation & Execution *of them both*.

"John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York, April 12, 1790," in 2 *The Documentary History of the Supreme Court of the United States, 1789-1800* 25, 27 (Maeva Marcus, ed. 1988) (emphasis added). *See generally* Anthony D'Amato, "The Alien Tort Statute and the Founding of the Constitution," 82 *Am. J. Int'l L.* 62 (1988); Anne-Marie Burley, "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor," 83 *Am. J. Int'l L.* 461 (1989).

meaningless.[9]

In addition, the Petitioner's position rests on a self-serving anachronism. The concept of a "cause of action" only "became a legal term of art when the New York Code of Procedure of 1848 abolished the distinction between actions at law and suits in equity and simply required a plaintiff to include in his complaint '[a] statement of the facts constituting the cause of action.'" *Davis v. Passman*, 442 U.S. 228, 237 (1979). Thus, the Petitioner apparently believes that the ATCA lay dormant from the day of its passage in 1789 until sometime in the nineteenth century when it suddenly sprang into meaning with the arrival of the cause of action concept.[10]

Every court that has considered the issue found that the ATCA establishes subject matter jurisdiction and a cause of action. In *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995), for example, the Ninth Circuit explicitly held that the ATCA provides both subject matter jurisdiction and a cause of action. Its opinion

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[9] As noted by the court in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987), *reconsidered on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988):

> It is unnecessary that plaintiffs establish the existence of an independent, express right of action, since the law of nations clearly does not create or define civil actions, and to require such an explicit grant under international law would effectively nullify that portion of the statute which confers jurisdiction over tort suits involving the law of nations.

[10] This "rather late arrival of the term [cause of action] upon the legal scene raises at least a question when it is applied to interpret the alien tort statute . . . ." D'Amato, *supra*, at 95 (citation omitted); Paust, *supra*, at 224-236.

carefully examined the ATCA and distinguished it from other jurisdictional statutes:

> [I]n contrast to section 1331, "which requires that an action 'arise under' the laws of the United States, section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action." *Tel-Oren v. Libyan Arab Republic*, [726 F.2d 774, 779] (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). It is unnecessary that international law provide a *specific* right to sue. International law "does not require any particular reaction to violations of law. . . . Whether and how the United States wished to react to such violations are domestic questions." *Id.* at 777-78 (quoting Louis Henkin, *Foreign Affairs and the Constitution* 224 (1972). "Nothing more than a *violation* of the law of nations is required to invoke section 1350." *Id.* at 779.

Id. at 1475. *See also Trajano v. Marcos*, 978 F.2d 493 (emphasis in original).

The federal courts have consistently supported this interpretation of the ATCA. *See, e.g., Estate of Rodriquez v. Drummond Company*, 256 F. Supp.2d at 1250 (N.D. Ala. 2003) ("[T]he ATCA 'creates both subject matter jurisdiction and a private right of action'"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003) ("ATCA provides a cause of action in tort for breaches

of international law"), *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (rejecting contention that ATCA only provides jurisdiction); *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1365 (S.D. Fla. 2001) (ATCA provides a cause of action to aliens for violations of international law); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 441 (D.N.J. 1999) ("[T]he ATCA provides both subject matter jurisdiction and a private right of action for violations of the law of nations."); *Jama v. I.N.S.*, 22 F. Supp. 2d at 363 (ATCA provides both jurisdiction and a cause of action); *Abebe-Jira v. Negewo*, 72 F.3d 844 at 848 ("[T]he Alien Tort Claims Act confers both a forum and a private right of action to aliens alleging a violation of international law."); *Kadic v. Karadzic*, 70 F.3d at 241 (ATCA provides jurisdiction and a cause of action); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) ("The plain language of the [ATCA] and the use of the words 'committed in violation' strongly implies that a well pled tort[,] if committed in violation of the law of nations, would be sufficient [to give rise to a cause of action]"); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995) (ATCA "yields both a jurisdictional grant and a private right to sue for tortious violations of international law . . . ."); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988) ("[T]he Alien Tort Statute provides a cause of action for 'international torts,' . . . .").

In contrast, only two judges (not courts) have challenged this mainstream view of the ATCA. In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), the D.C. Circuit dismissed an ATCA lawsuit in a *per curiam* decision, with each judge issuing

separate concurring opinions.[11] Judge Robb declined jurisdiction on the grounds that the court was presented with a non-justiciable political question.[12] Judge Edwards proclaimed his adherence to the legal principles established in *Filartiga* but distinguished that case on factual grounds. Judge Bork took a determinedly different approach. He stated that the ATCA was merely a jurisdictional statute and could not be considered a grant of a cause of action.[13]

In *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), the D.C. Circuit dismissed a *habeas corpus* action on jurisdictional grounds. The court also dismissed additional claims filed under the ATCA. While Judge Randolph issued a concurring opinion seeking to resurrect Judge Bork's view on the ATCA, the other members of the panel found the issue irrelevant and declined to consider it.

Judges Bork and Randolph are forceful advocates of judicial abnegation in this area, but their views do not reflect

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[11] Given the fractured nature of the opinion, the Justice Department has previously referred to *Tel-Oren* as having "little, if any, precedential value." Brief of the United States as Amicus Curiae Filed in Opposition to Petition for Certiorari, *Tel-Oren v. Libyan Arab Republic*, No. 83-2052 (January 1985), at 9. Even Judge Bork himself admitted that the divisions within *Tel-Oren* made "it . . . impossible to say even what the law of this circuit is." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 823 (Bork, J., concurring).

[12] Inexplicably, Judge Robb never cited *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court's leading decision on the political question doctrine.

[13] Not a single court has embraced Judge Bork's argument in *Tel-Oren*. Even district courts within the D.C. Circuit have declined to follow Judge Bork's approach to the ATCA. *See, e.g., Doe v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3 (D.D.C. 1998).

established principles of law. To date, not a single federal court has accepted this restrictive interpretation of the First Judiciary Act.

B. This Approach is Consistent with the United States Government's Prior Interpretations of the Alien Tort Claims Act.

The Petitioner's brief and the Justice Department's most recent filing mark a striking departure from the United States Government's previous comments and submissions concerning the nature and scope of the Alien Tort Claims Act.

In 2000, for example, the State Department declared to the U.N. Committee against Torture that:

> U.S. law provides *statutory rights of action* for civil damages for acts of torture occurring outside the United States. One statutory basis for such suits, the Alien Tort Claims Act . . . represents an early effort to provide a judicial remedy to individuals whose rights have been violated under international law.

U.N. Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at para. 277 (emphasis added). In 1996, the State Department declared in its submission to the U.N. Commission on Human Rights that the "statute was originally enacted to provide *a remedy to individuals* who suffered a 'tort' at the hands of privateers seeking prize money under the law of admiralty. More recently, it has been applied to cases of human rights violations." U.N. Commission on Human Rights, Question of the Human

Rights of All Persons Subjected to Any Form of Detention or Imprisonment, U.N. Doc. E/CN.4/1996/29/Add.2 (1996), at para. 15 (emphasis added). Both these statements represent the official position of the United States Government in its dealings with the international community.

The State Department interpretation of the ATCA is not unique. The Justice Department has taken a similar approach in ATCA litigation. In *Filartiga v. Pena-Irala*, for example, the Justice Department noted that some violations of international law are judicially cognizable as torts "within the meaning of Section 1350."[14] *See* Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, (2d Cir. 1980), *reprinted in* 19 *Int'l Legal Materials* 585, 601-602 (1980). Indeed, the Justice Department indicated that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." *Id.* at 604. *See also* Statement of Interest of the United States, *Kadic v. Karadzic*, No. 94-9035 (2d Cir. 1995) (affirming the ATCA and the *Filartiga* litigation).

C. This Approach is Consistent with the Torture Victim Protection Act of 1991.

The Torture Victim Protection Act of 1991 ("TVPA"), which allows victims of torture and summary execution to sue

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[14] In its *Filartiga* submission, the Justice Department also dismissed challenges to the constitutionality of the ATCA. "Customary international law is federal law, to be enunciated authoritatively by the federal courts. An action for tort under international law is therefore a case 'arising under . . . the laws of the United States' within Article III of the Constitution." Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, (2d Cir. 1980), *reprinted in* 19 *Int'l Legal Materials* 585, 606 (1980).

the perpetrators of such atrocities, supports this approach to the Alien Tort Claims Act. 28 U.S.C. § 1350 note.

The TVPA was first introduced in 1986. In submitting the bill to the Senate, Senator Arlen Spector stated:

> The landmark case of *Filartiga v. Pena-Irala* confirmed that official torture is in fact a violation of the law of nations. . . . In holding that the court had jurisdiction over this suit, Judge Irving Kauffman [sic] reviewed the accepted sources of international law – the usage of nations, judicial opinions and the works of jurists – and concluded that official torture of both aliens and citizens violates the law of nations and raises a cause of action for damages under the Alien Tort Claims Act, 28 U.S.C. Section 1350. . . . Since that holding, several recent decisions have questioned whether this statute provides a clear basis for future suits in U.S. federal courts. In *Tel-Oren v. Libyan Arab Republic*, for example, judges dismissed an action brought under Section 1350 and noted the lack of clear congressional guidance on the subject. . . . The legislation I am introducing today . . . seeks to clarify this area of law.

132 *Cong. Rec.* S 7062 (June 6, 1986) (citations omitted).

Five years later, the bill was reintroduced in Congress. The House and Senate reports on the TVPA described the *Filartiga* opinion, which met with congressional approval, and the *Tel-Oren* opinion, which did not. According to the House Report:

[In *Tel-Oren*,] Judge Bork questioned the existence of a private right of action under the Alien Tort Claims Act, reasoning that separation of powers principles required an explicit and preferably contemporary grant by Congress of a private right of action before U.S. courts could consider cases likely to impact on foreign relations. . . . The TVPA would provide such a grant, and would also enhance the remedy *already available* under section 1350 in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

H.R. Rep. No. 367, 102d Cong., 1st Sess., pt. 1, at 4 (1991) (emphasis added). The Senate Report contained similar language of support for the ATCA and the *Filartiga* precedent. *See* S.Rep. No. 249, 102d Cong., 1st Sess., at 3 (1991) ("The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 . . . . Section 1350 has

other important uses and should not be replaced.").

In sum, Congress has considered the nature and scope of the ATCA and the *Filartiga* precedent and has affirmed their status through the adoption of the Torture Victim Protection Act.[15] *See Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, 104 (2d Cir. 2000); *Abebe-Jira v. Negewo*, 72 F.3d at 848; *Hilao v. Marcos*, 25 F.3d at 1475-1476.

The Petitioner and the Justice Department argue that it is the intent of the enacting Congress, and not a subsequent Congress, that controls the scope and meaning of the ATCA. Petitioner's Brief, at 44; Justice Department's Brief, at 27. According to their position, the legislative history of the TVPA is "entitled to no weight." Justice Department Brief, at 27. This approach, however, disregards established principles of statutory interpretation.

> At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination necessarily assumes that the implications of a

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[15] While the TVPA affirms and extends the *Filartiga* precedent, it does not appear that any bill has ever been introduced in Congress seeking to limit the nature and scope of the ATCA. Such congressional silence should also be considered by this Court. *Cf. American Insurance Association v. Garamendi*, 123 S. Ct. 2374, 2394 (2003) ("Indeed, it is worth noting that Congress has done nothing to express disapproval of the President's policy. Legislation along the lines of HVIRA has been introduced in Congress repeatedly, but none of the bills has come close to making it into law.").

> statute may be altered by the implications of a later statute." [citation omitted] This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.

Food and Drug Administration v. Brown & Williamson, 529 U.S. 120, 143 (2000). As a related statutory enactment, the TVPA sheds light on the ATCA and should be considered by this Court.

Finally, the Petitioner argues that the TVPA supports its position because if the ATCA "already granted aliens the right to sue for *all* tortious violations of binding international legal norms, then Congress did not need to create an express cause of action for aliens that covers a very narrow category of such violations." Petitioner's Brief, at 44 (emphasis in original). This argument fails to recognize a significant difference between the ATCA and the TVPA – the ATCA is limited to aliens whereas the TVPA applies to all individuals, including U.S. citizens.[16]

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[16] *See also* U.N. Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at para. 281 ("The remedies available under the Alien Tort Claims Act have been supplemented by the 1992 Torture Victims Protection Act. [citation omitted] While the Alien Tort Claims Act only provides a remedy to foreign nationals, the 1992 Torture Victims Protection Act allows both foreign nationals and United States citizens to claim damages against any individual who engages in torture or extrajudicial killing . . . .").

II. THE ALIEN TORT CLAIMS ACT DOES NOT ENFORCE UNRATIFIED TREATIES OR NON-BINDING U.N. RESOLUTIONS.

By its terms, the ATCA requires federal courts to determine the content of international law. While this requires courts to carefully examine the status of international law, it does not allow courts to create law out of unratified treaties or non-binding U.N. resolutions. Petitioner's Brief, at 45; Justice Department's Brief, at 28. Rather, these sources are consulted because they offer evidence of international law.[17]

Customary international law arises out of a consistent state practice recognized out of a sense of legal obligation (*opinio juris*). Evidence of both the objective element and the subjective element can take many forms, so long as it reflects state practice and a sense of legal obligation. *See, e.g., Restatement (Third) of the Foreign Relations Law of the United States* § 102(2) (1987). *See also United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *The Nereide*, 13 U.S. (9 Cranch) 388 (1815). The Supreme Court has identified the sources that courts should consult for evidence of customary international law: "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . ." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

In *Filartiga*, for example, the Second Circuit concluded that torture was a violation of customary international law by

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[17] By enacting the ATCA as a means for determining what claims are cognizable before the courts, Congress chose to exercise its power to incorporate international law by reference. *See* Paust, *supra*, at 12-14, 64-65, 391. *See also United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158-162 (1820).

reviewing several sources – multilateral and regional treaties, a draft convention prohibiting torture, domestic laws of several countries, resolutions of international organizations, and the writings of publicists. *Filartiga*, 630 F.2d at 882-84. In its own submission in *Filartiga*, the Justice Department used the same sources to conclude that customary international law prohibited torture. These sources were consulted because cumulatively they provided evidence that torture was a violation of international law.[18]

To date, the federal courts have engaged in a careful and measured analysis of the individual claims raised in ATCA cases, accepting only well-established, universally recognized norms of international law.[19] Contrary to Petitioner's assertions, the federal courts have functioned as effective gatekeepers in ATCA cases, allowing only claims that are well-established under customary international law (and

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[18] In *Kadic v. Karadzic*, the Justice Department referenced a variety of sources, including non-self-executing treaties because "they are probative of the content of the law of nations." Statement of Interest of the United States, *Kadic v. Karadzic*, No. 94-9035, at 16 (2d Cir. 1995).

[19] The federal courts have also dismissed claims involving well-established, universally recognized norms of international law when the pleadings fail to support the essential elements of the claim. *See, e.g., Estate of Rodriquez v. Drummond Company*, 256 F. Supp. 2d 1250, 1261 (N.D. Al. 2003) (genocide claim unavailable where plaintiffs failed to allege that persecution was due to national, ethnical, racial, or religious reasons); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 168 (5th Cir. 1999) (genocide claim unavailable when pleadings "are devoid of discernable means to define or identify conduct that constitutes a violation of international law").

recognized by the United States) to proceed.[20]

For example, courts have recognized the viability of ATCA suits for such claims as: **genocide** - *Kadic v. Karadzic*, 70 F.3d at 232; *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d at 289; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Mushikiwabo v. Barayagwiza*, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. 1996); **summary execution** - *Estate of Rodriquez v. Drummond Company*, 256 F. Supp. 2d at 1250; *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp.2d at 1345; *Wiwa v. Royal Dutch Petroleum Company*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002); *Xuncax v. Gramajo*, 886 F. Supp. at 162; *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), *reconsidered on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988); **torture** - *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d at 289; *Wiwa v. Royal Dutch Petroleum Company*, 2002 U.S. Dist. LEXIS at 3293; *Tachiona v. Mugabe*, 234 F. Supp. 2d at 401; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1322; *Abebe-Jira v. Negewo*, 72 F.3d at 844; *Kadic v. Karadzic*, 70 F.3d at 232; *Xuncax v. Gramajo*, 886 F. Supp. at 162; *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997); *Hilao v. Estate of Marcos*, 25 F.3d at 1467; *Paul v. Avril*, 901 F. Supp. 330 (S.D.Fla. 1994);

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[20] The Petitioner cites three cases in support of his argument expressing concern with the range of putative offenses that could give rise to ATCA litigation. Petitioner's Brief, at 45. *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983). Petitioner fails to note, however, that each case was dismissed. Indeed, the Second Circuit imposed double costs on the appellant and her attorney in *Zapata* because of the vexatious nature of the lawsuit, further evidencing the ability of the courts to manage such litigation.

Trajano v. Marcos, 978 F.2d at 493; *Forti v. Suarez-Mason*, 672 F. Supp. at 1531. Similar findings have been made with respect to war crimes, including rape and other forms of sexual violence, slavery and forced labor, forced disappearance, and crimes against humanity. The United States has never argued, nor could it, that such acts do not constitute violations of the law of nations.

At the same time, federal courts have firmly rejected claims that they believe are not based on well-established norms of customary international law. At present, these claims include: **environmental harms** - *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1160-1161 (C.D. Cal. 2002); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Aguinda v. Texaco, Inc.*, 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. 1994); **censorship** - *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986); **commercial torts** - *De Wit v. KLM Royal Dutch Airlines*, 570 F. Supp. 613, 618 (S.D.N.Y. 1983); *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1347 (S.D.N.Y. 1982); **conversion** - *Cohen v. Hartman*, 634 F.2d 318, 320 (5th Cir. 1981); **fraud** - *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995); *Tamari v. Bache & Co. S.A.L.*, 730 F.2d 1103, 1104 (7th Cir. 1984); **negligence resulting in personal injury or death** - *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 348 (S.D. Tex. 1989); *Shanker Hedge v. British Airways*, 1982 U.S. Dist. LEXIS 16469 (N.D. Ill. 1982).

As rightly noted, "courts must proceed with extraordinary care and restraint" when determining the status of customary international law. *Flores v. Southern Peru Copper Corp.*, 343 F.3d at 154. To date, the courts have

heeded this admonition.[21]

Ultimately, the Petitioner and the Justice Department seek to limit actionable wrongs under the ATCA to violations of self-executing treaties that have been signed and ratified by the United States and which explicitly create a right of action. To do so, however, would deprive the ATCA of any force because the "law of nations" component would never apply and the "treaty of the United States" component would only apply to claims already within the scope of 28 U.S.C. § 1331. But only Congress can rewrite the statute in such a fundamental way.

III. ALIEN TORT CLAIMS ACT LITIGATION IS NOT BARRED BY THE GENERAL PRESUMPTION AGAINST THE EXTRATERRITORIAL APPLICATION OF FEDERAL STATUTES.

The Petitioner and the Justice Department assert that the ATCA cannot be applied to extraterritorial acts and urge the Court to graft a territorial requirement onto the ATCA. Petitioner's Brief, at 37; Justice Department's Brief, at 54-57. Respectfully, the Court should decline this invitation to do so.[22]

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[21] *See also United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (engaging in a careful and measured analysis of customary international law).

[22] The Petitioner and the Justice Department conflate a sufficient condition for ATCA jurisdiction with a necessary one. If an alien were injured by a tortious violation of international law in the United States, subject matter jurisdiction under the ATCA would be established. *See, e.g., Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793). But it hardly follows that territoriality is a precondition for all exercises of jurisdiction under the ATCA.

As a preliminary matter, the historical record does not support this approach to the ATCA. For example, Attorney General Bradford noted in 1795 that British citizens injured in a French raid on a British colony "have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States." 1 *Op. Att'y Gen.* at 59. At no time did the Attorney General identify a locus requirement as a necessary condition for ATCA litigation.

The basic error in calling for a locus requirement is that it fails to recognize the transitory nature of torts. The Framers understood that civil actions sounding in tort were considered transitory because the tortfeasor's wrongful act created an obligation that could follow him or her across national boundaries.[23] This understanding of tort was also well-recognized in the early case law of the Supreme Court.

> [T]he courts in England have been open in cases of trespass other than trespass upon real property, to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespass committed within the realm and out of the realm, or within or without the king's foreign dominions.

McKenna v. Fisk, 42 U.S. 241, 248 (1843). Indeed, the transitory nature of torts reflects the general acceptance that

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[23] *See Cheshire's Private International Law*, 257-261 (8th ed. 1970); *Watts v. Thomas*, 5 Ky. (2 Bibb) 458 (1811); *Stout v. Wood*, 1 Blackf. 71 (Ind. Circ. Ct. 1820); *Mostyn v. Fabrigas*, 1 Cowp. 161 (K.B. 1774).

"a state or nation has a legitimate interest in the orderly resolution of disputes within its borders." *Filartiga*, 630 F.2d at 885.

One reason that the drafters of the First Judiciary Act sought federal review of transitory torts involving claims of international law was to ensure uniformity in matters pertaining to foreign affairs. According to the Justice Department in its *Filartiga* submission, the ATCA "is one of several provisions of the Judiciary Act 'reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions.'" Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 19 *Int'l Legal Materials* at 588 (*quoting Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964).

There is another reason to suggest that the drafters of the First Judiciary Act intended for the ATCA to regulate transitory torts that raised international concerns. Considered in its historical context, the ATCA was a direct and natural "response to what the Founders understood to be the nation's duty to propagate and enforce those international law rules that directly regulated individual conduct." Anne-Marie Burley, "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor," 83 *Am. J. Int'l L.* 461, 475 (1989).

It is certainly not fatal to ATCA litigation that international norms have evolved since 1789 and now regulate such acts as torture, slavery, or genocide.[24] By its

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[24] *See United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) ("It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the

nature (and like the common law), international law is evolutionary.[25] Although "[t]he Framers might not have anticipated the fact that the law of nations would come to prohibit one alien from torturing another, . . . it is unrealistic to think that they would have wanted the federal courts to shrink from enforcing the law of nations 'in its modern state of purity and refinement.'" William Dodge, "The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context," 42 *Va. J. Int'l L.* 687, 701 (2002). *See also* Burley, *supra*, at 482 (ATCA was adopted as "a moral imperative – a matter of national honor."). As several courts have properly observed, "[b]ecause of the nature of the alleged acts, the United States has a substantial interest in affording alleged victims of

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principle can be considered as incorporated into the public code of nations."). *See also The Paquete Habana*, 175 U.S. 677 (chronicling the development of the law of nations); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (distinguishing between "ancient" and "modern" law of nations). "Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Filartiga*, 630 F.2d at 881.

[25] This was the position of the Justice Department in the *Filartiga* litigation. "The law of nations in Section 1350 refers to the law of nations as that body of law may evolve. There is no reason to believe that Congress intended to freeze the meaning of the law of nations in this statute as of 1789, any more than it intended the simultaneous grant of jurisdiction over maritime actions to be limited to maritime law as it then existed. Since the law of nations had developed in large measure by reference to evolving customary practice, the framers of the first Judiciary Act surely anticipated that international law would not be static after 1789." Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 19 *Int'l Legal Materials* at 588.

atrocities a method to vindicate their rights."[26] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d at 340.

It is not surprising, therefore, that efforts to add a locus requirement to the ATCA have been explicitly rejected by the courts. *See, e.g., Trajano v. Marcos*, 978 F.2d at 500 ("We are constrained by what § 1350 shows on its face: no limitations as to the citizenship of the defendant or the locus of the injury").

IV. ALIEN TORT CLAIMS ACT LITIGATION SHOULD NOT BE PRESUMPTIVELY BARRED BY ALLEGED "SEPARATION OF POWERS CONCERNS."

Both the Petitioner and the Justice Department argue that ATCA cases inherently pose separation of powers concerns. Petitioner's Brief, at 8; Justice Department's Brief, at 46. In support of this assertion, they allege that ATCA litigation will create tensions with other nations and

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[26] *See also* Testimony of Abraham Sofaer, the State Department's Legal Adviser, with respect to the Convention against Torture.

> The Administration . . . believes . . . that, as a member of the international community, we must stand with other nations in pledging to bring to justice those who engaged in torture, *whether in U.S. territory or in the territory of other countries.*

U.N. Convention on Torture, Hearings before the Committee on Foreign Relations, U.S. Senate, 100th Cong., 2d Sess. (Jan. 30, 1990), at 8 (emphasis added).

undermine the war on terrorism.[27] Their arguments suggest that courts are incapable of regulating ATCA litigation and that a permanent barrier is needed to deter these lawsuits.

Despite such broad assertions, it is inaccurate to suggest that the federal courts cannot protect the United States from abusive litigation. The courts have developed several doctrines of judicial abstention to ensure respect for separation of powers, including the political question doctrine, the act of state doctrine, and the doctrine of *forum non conveniens*. Other judicial doctrines – from standing requirements to statutes of limitations – also impose rigorous requirements on ATCA litigation. But these doctrines require the courts to consider them on a case-by-case basis.[28]

For example, the political question doctrine constitutes one form of judicial abstention that allows courts to protect the separation of powers. *Baker v. Carr*, 369 U.S. 186, 217 (1962). *See, e.g., Anderman v. Federal Republic of Austria*, 256 F. Supp.2d 1098 (C.D. Cal. 2003) (dismissal pursuant to political question doctrine). The act of state doctrine serves

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[27] In support of its assertion that ATCA cases could have serious implications for the current war on terrorism, Justice Department cites *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). Justice Department's Brief, at 52-53. But it is unclear how *Al Odah* could possibly be viewed as having "serious implications for our current war on terrorism," especially when the case was dismissed by the D.C. Circuit Court of Appeals. If anything, *Al Odah* confirms that the federal courts are fully capable of dismissing ATCA claims if these cases do not meet the exacting standards of the statute. *Al Odah*'s connection to the ATCA is unclear in any event, since two members of the three-judge panel concluded that the ATCA was irrelevant to the case.

[28] *See* Jeffrey M. Blum & Ralph G. Steinhardt, "Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After *Filartiga v. Pena-Irala*," 22 *Harv. Int'l L.J.* 53 (1981).

a related function, precluding courts "from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory . . . ." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). *See, e.g., Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d at 1116 (dismissal pursuant to act of state doctrine). The doctrine of *forum non conveniens* provides yet another form of judicial abstention that allows the federal courts to dismiss lawsuits that are more properly litigated in a foreign jurisdiction. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). *See, e.g., Aguinda v. Texaco, Inc.*, 303 F.3d at 470 (dismissal pursuant to doctrine of *forum non conveniens*).

The Petitioner and Justice Department appear to disregard these judicial doctrines when they imply that the federal courts are incapable of addressing separation of powers concerns in ATCA litigation. But overbroad concerns such as these have been dismissed by this Court before.

> There are sweeping statements to the effect that all questions touching foreign relations are political questions. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Baker v. Carr, 369 U.S. at 211-212. *See also Japan Whaling*

Association v. American Cetacean Society, 478 U.S. 221, 230 (1986) ("Under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and [it] cannot shirk this responsibility merely because our decision may have significant political overtones."). And as this Court noted in *W.S. Kirkpatrick v. Environmental Tectonics*, 493 U.S. 400, 409 (1990), courts "[h]ave the power, and ordinarily the obligation, to decide cases and controversies properly presented to them."

In short, "[t]here is, then, no Supreme Court precedent for extraordinary abstention from judicial review in foreign affairs cases." Louis Henkin, *Foreign Affairs and the U.S. Constitution* 146 (2d ed. 1996). Rather, ATCA lawsuits should be considered on a case-by-case basis.[29] "We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign

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[29] In its *Filartiga* submission, the Justice Department acknowledged that courts in ATCA litigation must engage in a careful analysis of the underlying international norms before allowing such lawsuits to proceed.

> [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. [citation omitted] When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts.

Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 19 *Int'l Legal Materials* at 604.

affairs." *Kadic v. Karadzic*, 70 F.3d at 249.

The final irony is that the Petitioner and Justice Department suggest that ATCA litigation would undermine the war on terrorism and the fight against international crime. But the opposite is true: it is precisely through civil litigation that victims of international crimes, including terrorism, can seek compensation for their injuries and punish perpetrators of these atrocities.[30] It would be wrong to create blanket immunity for defendants accused of such horrific acts and, in the process, to take away the one (and perhaps only) weapon available to victims of serious human rights abuses.

CONCLUSION

The Alien Tort Claims Act plays a critical role in upholding fundamental principles of international law and has done so for almost a quarter-century. It provides victims of serious human rights abuses – from slavery and genocide to torture and terrorism – with the ability to seek redress for their injuries in U.S. courts.

The Petitioner and the Justice Department should not be allowed to eviscerate a statute that has been affirmed by the three branches of government on numerous occasions. To do so would cause further injury to victims of serious human rights abuses and would send the wrong message to perpetrators of such egregious acts.

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[30] *Cf.* The Anti-Terrorist Act of 1990, 18 U.S.C. § 2333.

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